

A hearing to consider confirmation of Debtor's Chapter 13 plan in the above-captioned case was conducted on November 8, 1993, in Waycross, Georgia. Debtors' plan proposed a payment of \$600.00 monthly to the Trustee in order to pay secured and priority claims in full and to pay general unsecured creditors on a composition basis which the Trustee estimated would come to approximately a 35% dividend to unsecured creditors. An objection to confirmation was filed by Tarmac Florida, Inc., d/b/a Dixie Redi-Mix ("Tarmac"), holder of a claim in the amount of \$14,357.43. It was revealed that the claim was not timely filed, but the Debtors consented to the allowance of the claim notwithstanding its tardiness in order that the objecting creditor would participate in the distribution to unsecured creditors. Tarmac's objection essentially alleges that Debtor, who was employed as a contractor, obtained certain draws for a construction project, based upon false representations. Specifically, Debtor allegedly represented that he would pay all

materialmen and suppliers on the project and failed to do so, leaving Tarmac with an uncollectible balance in the amount claimed. Tarmac contends that Debtor's conduct constitutes a willful and malicious injury under 11 U.S.C. Section 523 and that that conduct was sufficient to require denial of confirmation. Debtor disputes both factually and legally the result urged by the objecting creditor. After considering all the evidence I conclude that the objection should be overruled and an order of confirmation shall be issued.

FINDINGS OF FACT

_____ Debtor, doing business as Palmer Construction Company, executed a construction contract with David Evans, doing business as Prehistoric Ponds, on December 2, 1991, agreeing to perform certain work for a contract price in the amount of \$58,350.00. The contract required that, in order to obtain bi-weekly \$8,000.00 draws on the job, the contractor would furnish a notarized affidavit stating that all subcontractors and vendors had been paid up to that point. *See Exhibit "1."* In fact, Debtor executed documents captioned "Contractor's Affidavit" on December 13, 1991, December 30, 1991, January 10, 1992, January 22, 1992, and February 11, 1992. *See Exhibit "3."* Each so-called affidavit contained language to the effect that the contractor had "paid for all labor and materials used in said construction or shall pay for same from the draw of funds herein evidenced." Based on these affidavits, the contractor drew a total of \$40,000.00 as the job progressed. During this period, Tarmac delivered certain materials to the job site, but it did not, and has not to date, received payments from Debtor. Debtor admitted owing the funds, but stated that he had used the \$40,000.00 in draws to pay other labor and materials on the job and that the

funds had simply run out before he was able to pay the Tarmac bill. He denied that the monies were applied to other jobs or were converted to his personal use.

At the close of the evidence the record was unclear as to how the \$40,000.00 in funds had been expended and I left the record open for two weeks to permit the Debtor to file an affidavit setting forth how the funds received had been disbursed. I also granted an additional two weeks time for any counter affidavit to be filed by the objecting creditor. Debtor's affidavit was filed November 12, 1993, and there has been no evidence submitted in contravention of same. That affidavit reveals receipts of \$40,000.00 pursuant to the five construction draws and total expenses paid of \$45,300.15. This figure included an amount of \$2,800.00 which was drawn by the Debtor personally for his labor, supervision, and management of the job.

CONCLUSIONS OF LAW

11 U.S.C. Section 1325 provides the legal framework for confirming a Chapter 13 plan. That section provides in relevant part:

- (a) Except as provided in subsection (b), the court shall confirm a plan if--
 - (3) the plan has been proposed in good faith and not by any means forbidden by law;

11 U.S.C. §1325(a)(3). Upon confirmation of a Chapter 13 plan, successful completion of all payments and entry of a discharge, the Debtor is discharged pursuant to 11 U.S.C. Section 1328 of "all debts provided for by the plan" except any debt:

- (1) provided for under section 1322(b)(5) of this title;
- (2) of the kind specified in paragraph (5), (8), or (9) . . . of section 523(a) of this title;

This provision has been referred to as the Chapter 13 "superdischarge" because it discharges debtors from obligations which would not be dischargeable in a Chapter 7 case. *See* 11 U.S.C. §523. In particular, the Chapter 13 discharge will, if entered, discharge a debtor from obligations that would be excepted from discharge under 11 U.S.C. Section 523(a)(2)(a) which provides in relevant part:

- (a) A discharge . . . does not discharge an individual debtor from any debt--
 - (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by--
 - (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

Nevertheless, in determining whether a debtor's plan is proposed in good faith it has been widely recognized that the existence of a potentially non-dischargeable Chapter 7 obligation may be grounds for concluding that a debtor has not proceeded in good faith and therefore

may serve as a ground for denial of confirmation or dismissal of the Chapter 13 case. *See e.g., In re Waldron*, 785 F.2d 936 (11th Cir. 1986) *cert. dismissed*, Waldron v. Shell Oil Co., 478 U.S. 1028, 106 S.Ct. 3343 (1986) ("We hold that with Section 1325(a)(3) Congress intended to provide bankruptcy courts with a discretionary means to preserve the bankruptcy process for its intended purpose. Accordingly, whenever a Chapter 13 petition appears to be tainted with a questionable purpose, it is incumbent upon the bankruptcy courts to examine and question the debtor's motives. If the court discovers unmistakable manifestations of bad faith . . . confirmation must be denied."); *See also In re Kitchens*, 702 F.2d 936 (11th Cir. 1986).

In the instant case, the only issue of good faith presented is whether the Debtor's conduct in the prosecution of this construction contract is such as would deny him a discharge as to the debt in a Chapter 7 case and would further permit an inference that the Chapter 13 plan has not been proposed in good faith. I conclude that, under established precedent in this District, a Chapter 7 debtor would receive a discharge under the same circumstances as Debtors in the current case for the reason that, while not all of the bills that were incurred during the course of the construction contract were paid, the Debtor nevertheless devoted the total amount of proceeds received on the job to the payment of legitimate obligations arising out of the construction contract. *See e.g., In the matter of Terry Willie Montford (Nichols v. Montford)*, Ch.7 Case. No. 90-40728, Adv.Pro.No. 90-4119, Slip Op. at 10-11 (Bankr. S.D.Ga. Jan. 23, 1991) (holding debt non-dischargeable under §523(a)(6) because construction draws advanced by the homeowner to debtor *were not applied toward the construction of the homeowner's home*); In the matter of Roy Wooten,

Jr., et al. v. McKenzie v. Wooten, Ch.7 Case No. 89-20243, Adv.Pro.No. 89-2014, Slip Op. at 16-18 (Bankr. S.D.Ga. January 29, 1990) (Holding that of the total \$57,243.00 in construction draws which debtor received for building a particular home, \$11,882.59 was non-dischargeable because this amount had not been expended toward the construction of that home). The fact that the Debtor drew some \$2,800.00 for his personal labor is not fatal in this case because his loss on the job exceeded the amount which he personally drew.

Under these circumstances I conclude that, in a hypothetical Chapter 7 case, the Debtor would likely be entitled to discharge this obligation. This conclusion, however, is without prejudice to this issue being relitigated in the event that this case is converted to Chapter 7. Since no other evidence of bad faith has been presented to the Court and since the case will pay a substantial dividend to all creditors including the objecting creditor, the objection is overruled and the case by separate order will be confirmed.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Tarmac Florida, Inc.'s, d/b/a Dixie Redi-Mix, objection to confirmation is overruled.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of January, 1994.